

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>EARL D. ADAMS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,037,234
<b>ALBERT COOPER d/b/a</b>	)	
<b>COOPER SERVICE COMPANY</b>	)	
Uninsured Respondent	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

The Kansas Workers Compensation Fund (Fund) appealed the March 24, 2009, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on July 17, 2009, in Wichita, Kansas.

**APPEARANCES**

W. Walter Craig, of Derby, Kansas, appeared for claimant. Respondent appeared pro se. Kendall R. Cunningham, of Wichita, Kansas, appeared for the Fund.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

In the March 24, 2009, Award, Judge Barnes found that claimant was permanently and totally disabled as a result of his September 13, 2007, work-related accident, which fractured his right tibia and fibula just above his ankle and fractured his femur just below the ball of the right hip.

The Fund requests review of the Judge's finding that claimant is permanently and totally disabled. The Fund contends claimant has no greater disability now than he did before his September 2007 accident and, therefore, he is capable of returning to his former

work in the oil fields. The Fund requests the Board to find that claimant should be limited to an award for a 20 percent functional impairment to his right leg.

Claimant maintains the Judge's finding that he is permanently and totally disabled should be affirmed.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant, who is 60 years old, has worked in the oil fields for 40 years and worked for respondent the last 10 to 15 of those years. On September 13, 2007, while working for respondent, claimant fell off the gear box of a pump jack, fracturing his right tibia and fibula just above his ankle and his femur just below the ball of the right hip. He was taken to the hospital, where Dr. Bradley R. Dart performed surgery to repair the fractures.

During surgery to repair claimant's tibia and fibula, Dr. Dart removed hardware from an earlier ankle surgery. Because claimant's right ankle was improperly aligned and pointing inwards as a result of an earlier injury and the resulting surgery, Dr. Dart tried to correct that deformity as best he could. The doctor admitted he was not fully successful. When Dr. Dart last saw claimant on March 18, 2008, claimant complained of pain in his ankle and said he walked on the outside of his foot. The doctor testified claimant had minimal pain complaints in the right hip. Claimant was still wearing a CAM boot or walker, but Dr. Dart anticipated he would be able to wean himself from the walker and return to his normal preinjury ambulatory aids, whatever they may have been.

As of March 18, 2008, Dr. Dart did not believe that claimant needed restrictions relating to his ankle. The doctor did not think there were any vocational activities claimant should not do because of the problems he had on March 18, 2008. And although he understood claimant worked in the oil fields and stood on oil rigs, the doctor felt claimant was capable of resuming that work.

Dr. Sigurd Daehnke, claimant's personal physician, began treating claimant's injuries in late October 2007 and has treated him off and on since then. The doctor prescribed therapy and gave claimant medications. When claimant last testified in mid-September 2008, he was continuing to take pain medication and muscle relaxants.

**Nature and extent of claimant's injuries and disability**

While recovering from his injury, in either October or November 2007 claimant applied for Social Security disability benefits, which commenced sometime in 2008. Accordingly, claimant did not attempt to return to work for respondent and he has not looked for work with any other employer since the September 2007 accident. Claimant testified he did not intend to return to work because he does not believe he is capable of doing his job safely. He also maintains he cannot walk around the block and cannot sit in one spot for long.

But this is not the first time claimant had applied for Social Security disability benefits. Claimant partially amputated all the digits on his right hand while at work in October 2000. And in 2001 he fractured his right ankle when he was pushed from his porch at home. That ankle injury was repaired with wire, screws and plates. As a result of that injury and surgery, claimant had a badly deformed bone above his ankle that he described as being "kind of horseshoe shaped,"<sup>1</sup> which made him walk on the side of his foot. Following that right ankle injury claimant filed for Social Security disability benefits. In early January 2003, Dr. Daehnke prepared a disability claim form in which the doctor reported claimant had marked difficulty standing or walking that would persist for 12 months or more and resulted in severe functional impairment. The Social Security Administration denied claimant's request for disability benefits. And claimant eventually returned to work for respondent.

In addition to partially amputating the digits on his right hand, the right ankle problems, and right hip complaints, claimant also has been diagnosed with COPD (chronic obstructive pulmonary disease) and emphysema.<sup>2</sup> Dr. Daehnke testified the COPD and emphysema should not prevent claimant from working.<sup>3</sup> Moreover, claimant testified he qualified for the Social Security disability benefits due to his right leg injury.<sup>4</sup>

Dr. Daehnke, who last saw claimant in mid-March 2008, testified claimant appeared to have recovered fairly well from his September 2007 accident. But, because of the multiple problems with the hip and the fracture in the lower leg superimposed on the earlier ankle fracture, the doctor believed claimant would always experience some problems. Dr. Daehnke was unable to give an absolute opinion as to whether claimant was doing as

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<sup>1</sup> Adams Depo. at 22.

<sup>2</sup> Daehnke Depo. at 10.

<sup>3</sup> *Id.*, at 17.

<sup>4</sup> R.H. Trans. at 11, 12.

well in March 2008 as he was before his September 2007 accident; nevertheless, the doctor believed claimant was probably not. The doctor testified, in part:

I do not have an opinion as to -- something absolute as to whether he is doing as well as he did prior to his second injury. My impression would be that he probably is not, because when you superimpose one of these on something else and here someone who has multiple other problems as well, then I think it's just he's not going to get back to where he was prior to that time.<sup>5</sup>

As indicated above, Dr. Dart, who is eligible for board certification in orthopedic surgery, released claimant in March 2008 with no restrictions. The doctor attributed claimant's ongoing ankle complaints to the alignment of his ankle, which was misaligned before the September 2007 accident. The doctor, however, acknowledged that changing the alignment of claimant's ankle may have "drastically change[d] the way that he had been accommodated"<sup>6</sup> and that claimant was saying his ankle was worse than before the accident. Moreover, the doctor indicated he could only speculate as to what claimant's current condition might be.<sup>7</sup>

Claimant's attorney hired Dr. Michael H. Munhall to evaluate claimant. The doctor, who is board-certified in physical medicine and rehabilitation, examined claimant in mid-April 2008. Claimant reported right hip weakness, popping, aching, and pain; right ankle weakness and pain; and low back pain and lost motion. Dr. Munhall stated that claimant's low back problems were caused by muscle spasm and muscle pain because of the imbalance from the right hip and right leg length inequality, and possibly muscle shortening through the right low back.

Using the AMA *Guides*,<sup>8</sup> Dr. Munhall found that claimant fell into DRE Lumbosacral Category II, which provides a 5 percent whole person impairment, for his residual right hip, low back and right leg pain. The doctor felt there were objective findings that substantiated claimant's reported back complaints; namely, trigger points, muscle guarding, and spasms.<sup>9</sup> Dr. Munhall recommended restricting claimant to no weight-bearing activities,

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<sup>5</sup> Daehnke Depo. at 15.

<sup>6</sup> Dart Depo. at 24.

<sup>7</sup> *Id.*, at 27.

<sup>8</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>9</sup> Munhall Depo. at 25.

no climbing or above-ground work, no ladders, and no bending, squatting or stooping.<sup>10</sup> He also reviewed a list of former work tasks prepared by personnel consultant Jerry D. Hardin and indicated that claimant may be able to perform two tasks (supervising employees and completing paperwork), if the tasks could be performed in a sedentary or seated position and were completed in less than an hour at a time. Nonetheless, Dr. Munhall indicated that claimant was realistically permanently and totally disabled.<sup>11</sup>

Dr. Munhall also testified there was no way for him to know what disability claimant may have had before the September 13, 2007 work-related injury. Based on claimant's history, however, claimant had been capable of doing most of his jobs in the oil field as before the September 2007 accident he had returned to the oil field without restrictions reporting no significant difficulty with weight-bearing activities and walking without assistive devices. Dr. Munhall did not attempt to rate either loss of range of motion or loss of strength to claimant's right ankle and hip. But the doctor acknowledged claimant would most likely have had some range of motion deficits in his ankle before the September 2007 accident due to the earlier ankle fracture and the hardware used in repairing it.

Claimant's attorney also hired Dr. David W. Hufford to evaluate claimant. Dr. Hufford is board-certified in family practice, sports medicine, and as an independent medical examiner. The doctor examined claimant in early May 2008. Dr. Hufford determined claimant had a 10 percent impairment to the lower extremity for decreased motion in the right hip, a 5 percent impairment for crepitus in the right knee (which the doctor believed was related to claimant's altered gait), and a 7 percent impairment to the lower extremity for decreased motion in the right ankle. Those ratings combine for a 20 percent impairment to the right lower extremity.

Dr. Hufford believed claimant was limited to sedentary work "with no prolonged standing or walking of any kind and no lifting of any significant weight beyond negligible (less than 10 pounds)."<sup>12</sup> Upon reviewing the list of former work tasks prepared by Mr. Hardin, the doctor indicated claimant had a 100 percent task loss.

Dr. Hufford acknowledged he did not have any medical records from the treatment claimant received for his earlier right ankle injury and, therefore, it was not possible for him to apportion claimant's present impairment between the September 2007 accident and his earlier injury. Nonetheless, the doctor stated he was very cautious evaluating claimant to take that into account.

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<sup>10</sup> *Id.*, Ex. 2 at 5.

<sup>11</sup> *Id.*, at 19.

<sup>12</sup> Hufford Depo., Ex. 2 at 2.

Jerry D. Hardin, a personnel consultant, met with claimant in early June 2008. Together they prepared a list of the 14 job tasks claimant performed in the 15-year period before his accident. Mr. Hardin testified that it was his belief, after considering the opinions of Drs. Munhall and Hufford, that claimant has a 100 percent loss and is essentially and realistically unemployable.<sup>13</sup> Mr. Hardin opined claimant would be unable to obtain or perform substantial gainful employment based on the fact that he worked primarily as a rig operator in the oil fields for the last 15 years and has not done any other work, he is right-handed and consequently has trouble with paperwork (due to the partial amputation of the digits on that hand), and he lacks education that would lead to other employment. Mr. Hardin's June 5, 2008, report indicates claimant has a GED and welding training. According to Mr. Hardin, claimant belongs on Social Security disability.

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The Board affirms the Judge's finding that claimant is entitled to receive permanent total disability benefits as a result of his September 2007 accident. While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>14</sup>

In *Wardlow*,<sup>15</sup> the claimant, a former truck driver, was physically impaired and lacked transferable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. All the circumstances surrounding the worker's condition and the serious and permanent nature of his injuries, his lack of training and transferable skills, his being in constant pain and the necessity of constantly changing body positions were pertinent to the decision whether he was permanently and totally disabled.

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<sup>13</sup> Hardin Depo. at 15.

<sup>14</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>15</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

In short, *Wardlow* stands for the proposition that a worker who is rendered essentially and realistically unemployable qualifies for permanent total disability benefits.

In the present claim, claimant is a 60-year-old laborer who has principally worked in the oil fields over the last 15 years. Claimant has limited transferable work skills as he has limited education. Claimant now walks with a cane and when he last testified continued to take both pain medication and muscle relaxants. The Board finds claimant should not attempt to return to the oil fields. Claimant is limited to sedentary employment but there is no evidence in the record as to what sedentary employment he is qualified to perform. We know, however, that some sedentary jobs may be unavailable due to the partial amputation of the digits on his right hand.

In conclusion, the Board finds claimant has sustained a five percent whole person impairment and that he is now essentially and realistically unemployable.

The Workers Compensation Act also provides that an award may be reduced for preexisting functional impairment. The record, however, fails to establish the extent of that preexisting functional impairment and, therefore, there shall be no reduction under K.S.A. 2007 Supp. 44-501(c).

The Judge approved attorney fees for claimant's attorney. The file, however, does not contain the fee agreement entered into between Mr. Craig and claimant. On the other hand, the file does contain a fee contract between claimant and his former attorney, James R. Roth. In addition, on March 17, 2008, Mr. Roth filed a Notice of Attorney Fee Lien. There is nothing in the file to indicate that the lien has been addressed. Consequently, the order approving attorney fees should be set aside.

### **AWARD**

**WHEREFORE**, the Board modifies the March 24, 2009, Award entered by Judge Barnes to set aside the approval of attorney fees. The remainder of the Award is affirmed.

Should counsel desire a fee, counsel is directed to present the contract of employment and the issue of the lien for attorney fees to the Judge.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant  
James R. Roth, Former Attorney for Claimant  
Albert Cooper, Cooper Service Company, P.O. Box 381, Winfield, KS 67156  
Kendall R. Cunningham, Attorney for the Fund  
Nelsonna Potts Barnes, Administrative Law Judge